

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

STERICYCLE, INC.,

Employer,

and

Case No.: 32-RC-5603

**INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, AUTO TRUCK
DRIVERS, LINE DRIVERS, CAR
HAULERS, AND HELPERS, LOCAL NO. 70
OF ALAMEDA COUNTY, CALIFORNIA,
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS
OF AMERICA,**

Petitioner.

**EMPLOYER'S EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S REPORT ON OBJECTIONS**

COMES NOW the above-named Employer, Stericycle, Inc., as Employer in the above-captioned matter, and hereby sets forth the following Exceptions to the Administrative Law Judge's Report on Objections dated April 24, 2009.

1. THE ALJ ERRED AS A MATTER OF LAW BY APPLYING THE INCORRECT STANDARD TO DETERMINE WHETHER THE UNION GRANTED THE WORKERS PROHIBITED PRE-ELECTION BENEFITS.

(a) In the ALJ's report on objections, he referred to facts that clearly demonstrate that the Petitioner, International Brotherhood of Teamsters, Auto Truck Drivers, Line Drivers, Car Haulers, And Helpers, Local No. 70 of Alameda County, California, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers Of America, International Brotherhood of Teamsters ("Local 70" or "The Union"), provided members of the bargaining unit with a valuable, concrete pre-election benefit during the election campaign. [Report pg. 2, ln. 28; pg. 3, lns. 1-9; pg. 3 lns. 32-33.] The ALJ also referred to facts that show the Union was instrumental in encouraging members of the bargaining unit to participate in a class-action wage & hour lawsuit, *Ochoa v. Stericycle, Inc. No. C08-05219 (N.D. Cal.)* [hereinafter, "wage & hour lawsuit" or "lawsuit"]. [Report pg. 2, lns. 27; pg. 3 ln. 9.] The ALJ heard evidence from members of the bargaining unit that shows the wage & hour lawsuit was presented during organized meetings as a tool to both recruit supporters and as "leverage" in a corporate campaign against Stericycle. [Hearing pgs. 105-107.] The ALJ found that workers returned signed Attorney-Client Agreements in which the Union pledged to financially maintain the worker's lawsuit to either the Union representative or their attorney. [Exhibit 1; Report pg. 3, lns. 7-8.]

(b) The established precedent among the Federal Appellate Courts who have considered this issue is that the conferral of a concrete benefit, of any size, by a union during a representation certification campaign taints the "laboratory perfect conditions" required during a representation certification campaign and is grounds for a new election. *In re General Shoe Corp.*, 77 NLRB 124, 127 (1948); *See e.g. Freund Baby Co.*, NLRB 165 F.3d 928 (D.C. Cir. 1999). According to the Sixth Circuit Court of Appeals, the gifting of free legal services by a union during a campaign "imposes a 'sense of obligation' to a union" and "suffices to invalidate an election." *See Nestle Ice Cream Co. v. NLRB*, 46 F.3d 578, 584 (6th Cir. 1995) [hereinafter *Nestle Ice Cream*.] The established Federal Appellate Court precedent was clearly described in the Employer's post-hearing brief and is again outlined in the accompanying brief. The ALJ acknowledged the judicial precedent specifically described in *Freund Baking Co. v. NLRB*, 165 F.3d 928 (D.C. Cir. 1999) [hereinafter *Freund*], but chose to reject its holding, its legal reasoning, and its progeny in both the federal appellate courts and the NLRB by claiming "the Board has not yet accepted this reasoning" without providing any additional analysis. [Report pg. 4, ln. 11.] This is a grievous legal error that must be corrected.

(c) In previous decisions, the Board tested whether a Union's pre-election benefit is appropriate by hypothetically ascribing the Union's behavior to the

Employer to see if their behavior taints the elections. *See e.g. In re Mailing Services*, 293 NLRB 565 (1989). The Board would clearly not endorse an Employer's behavior in which:

- Employer gathers his employees together to discuss a lawsuit against the Union with the Employer's lawyer.
- Employer's lawyers are made available at Employer's expense for the employees to sue the Union.
- Employer distributes their lawyer's engagement letter which states that the Employer will pay for the legal fees in their quest to recover damages against the Union.
- The engagement letter also infers that if you pull-out of the you may be responsible for the costs incurred to date.
- The employer and the employer's attorney, meet with those employees and confirm this promise.
- All this is done during a union campaign.

Certainly this behavior eliminates the possibility of a the laboratory perfect conditions that the NLRB requires during a Union campaign. If the NLRB approves the Union's actions, is the NLRB endorsing similar behavior by the Employer?

2. THE ALJ ERRED AS A MATTER OF LAW IN RECOMMENDING THAT THE EMPLOYER'S OBJECTION TO CONDUCT AFFECTING THE RESULTS OF THE ELECTION BE OVERRULED BASED UPON THE HOLDING IN THE *NOVOTEL* CASE.

(a) Even if the ALJ's exclusive reliance on *Novotel, New York*, 321 NLRB 624 (1996) [hereinafter *Novotel*] in this case is legitimate, his recommendations are not consistent with the *Novotel* decision and the NLRB's later clarifications. See generally *Superior Truss & Panel, Inc.*, 334 NLRB 916 (2001); *Lincoln Park Subacute & Rehab Center, Inc.*, 333 NLRB 1137 (2001).

(b) As detailed in the accompanying brief, the ALJ erred by failing to distinguish the facts in *Novotel* from those in this case. By giving lip service to rules pertaining to the prohibition of pre-election benefits, and by selectively citing authority, he ignored numerous factual and legal distinctions that should require the ALJ to recommend that the Employer's election objections be sustained.

3. THE ALJ ERRED IN RULING THAT "THE UNION HAD A STATUTORY RIGHT TO FILE THE WAGE AND HOUR LAWSUIT."

(a) The Union has not filed a wage & hour lawsuit against Stericycle, Inc. as the ALJ's ruling suggests. Instead, sixteen (16) individuals, using money provided by the Union during a campaign, filed a lawsuit against Stericycle, Inc. [Exhibit 4.]

(b) The Union gave workers the financial backing to file and maintain a lawsuit against Stericycle during a representation campaign as a tangible gift to gain their support and to give the Union "leverage" against Stericycle. [Hearing pgs. 105-106.]

(c) The Union does not have standing to file a lawsuit on behalf of sixteen (16) drivers. Section 5 of the Portal-to-Portal Act bars unions from bringing representative actions under the FLSA. Pub.L.No. 80-49, § 5 (May 19, 1947); 29 CFR § 790.20 (representative actions for back wages barred by § 8); *Nevada Employees' Assn v. Bryan*, 916 F.2d 1384; 1392 (9th Cir. 1990).

4. THE ALJ ERRED IN GIVING WEIGHT TO THE UNION ATTORNEY'S JANUARY 7, 2009, CLIENT LETTER.

(a) The ALJ wrongly found the Union attorney's January 7, 2009, unilateral letter to its worker-clients to have a curing effect on the election taint caused by the Union's commitment to pay for the wage & hour lawsuit. [Report p.4, lns. 15-17.]

(b) First, the letter made the laughable claim that the Union's commitment to subsidize the lawsuit against Stericycle was simply "a mistake." [Exhibit 2.] This claim has little credibility because workers testified that as of the March 16, 2009 hearing they had not spent one dollar of their own money to initiate or maintain a Federal class action wage & hour lawsuit against their employer.

[Hearing pgs. 101, 164.] Despite the claims in the letter, the workers continued to receive the Union's pre-election benefit long after the Union attorney sent those letters. *Id.*

(c) Second, the workers testified that they signed a bilateral contract with the Union attorneys. [Hearing pgs. 144-145, 157, 164, 169, 171, 208, 213.] Some workers believed they were required to sign the agreement to recover money from the lawsuit. [Hearing, pgs. 126-127.] The Union attorneys, however, asked the NLRB to believe that a unilateral letter from the attorneys to their clients somehow eliminated the Union's contractual obligation to subsidize the litigation. It is axiomatic that a bilateral agreement between two parties may only be amended through a bilateral agreement between the same parties.

(d) Third, even if the letter credibly informed the workers of the Union's financial commitment as is acknowledged in *Freund*, a free and fair election was impossible. This is more fully explained in the accompanying brief.

If anything, the Union attorney's letters served to fully confuse the voting-unit members who remembered signing an Attorney-Client Agreement that was distributed at the Union Hall by a Union representative, [Hearing pgs. 144-145, 157, 164, 169, 171, 208, 213] which the Union pledged to pay for their legal services against the Employer. [Exhibit 1.] While there is understandable

confusion that results from the Attorney's letter, the workers were still receiving free-legal services provided by the Union.

5. THE ALJ ERRED BY FAILING TO RECEIVE EVIDENCE ON THE UNION'S DECEMBER 22, 2008 OFFER TO "DROP" THE LAWSUIT IN EXCHANGE FOR A STATEWIDE NEUTRALITY AGREEMENT.

(a) On December 22, 2009, two Union representatives arrived at Stericycle's San Leandro facility. [Hearing, pgs. 24-27.] The two walked into a room where Tom Stalberger (Stericycle District Manager for California), Terry Hales (Stericycle Transportation Supervisor), Bobby Taula (Stericycle Transportation Supervisor), Eloy Jimenez (Stericycle California District Transportation Manager), Sam Escobar (San Leandro Transportation Manager), and Bruno Katz (counsel for Stericycle), were meeting. [Hearing, pgs. 24-27.] The Union representatives stated they had just met with their attorneys, and that they had the authority to offer Stericycle a "bailout" that would make the federal class-action wage and hour lawsuit "go away" and save Stericycle money to be spent in attorneys' fees. [Hearing, pgs. 24-27.] In exchange, they said, Stericycle must agree to a neutrality agreement with Local 70, enter into immediate collective bargaining negotiations, and withdraw any objections to Local 70's petition. [Hearing, pgs. 24-27.] However, the Union representatives did not have permission from the sixteen (16) named plaintiffs to make a settlement offer of any

kind to Stericycle. (Hearing, pgs. 61-62, 87-88.) Stericycle rejected the Union's offer. [Exhibit 3.] A vocal Union supporter and the first named plaintiff in the lawsuit, Joel Ochoa, testified that the Union encouraged workers to join the lawsuit so that it could be used as "leverage" against Stericycle. [Hearing, pgs. 105-106.]

(b) The ALJ wrongfully excluded testimony about the December 22, 2008, meeting as evidence, allowing only one eyewitness to testify as an offer of proof, rejecting the admission of declarations from six (6) eyewitnesses, and preventing the live testimony of five (5) eyewitnesses. [Employer's Rejected Exhibits 1-5.] His basis for the ruling was that the testimony was not relevant to the election objection before him. [Hearing pg. 19.]

(c) Relevant evidence is: "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." Fed. R. Evid. 401.

(d) The Board's decision in *Novotel* examines the Union's intent in filing the lawsuit in determining whether the gift of free-legal services was "integral to the employees' employment related concerns." *Novotel, supra*, at 57. The ALJ erred by excluding evidence that tends to prove that the true intent of the Union's support of the wage & hour lawsuit was not to promote the workplace conditions of the San Leandro drivers, but to have "leverage" to negotiate a statewide

neutrality agreement without any of the worker-plaintiffs' permission or knowledge. [Hearing pgs. 24-27, 105-106.]

(e) The December 22, 2008, meeting is relevant evidence to prove that the true intent behind the lawsuit was not the employees' employment-related concerns as in *Novotel*, but the Teamster's state-wide campaign.

6. THE ALJ ERRED IN ALLOWING THE UNION ATTORNEY TO ASSERT THE ATTORNEY-CLIENT PRIVILEGE ON HIS CLIENTS' BEHALF AS A SHIELD TO THE UNION'S MISCONDUCT.

(a) The ALJ wrongfully allowed the Union attorney to assert the Attorney-Client privilege on his clients' behalf as a shield to the Union's misconduct. [Hearing, pgs. 12, 92-93, 109, 220.]

(b) The Attorney-Client privilege cannot be asserted for those meetings because a third-party, the Union organizer, Ms. Pilar Barton, was allowed to be present for those attorney-client discussions. [Hearing pgs. 78-82.] Ms. Barton was not an attorney or a potential Plaintiff in the lawsuit. [Hearing p. 59.] Her presence as a third-party waives the confidentiality protections otherwise protected by the Attorney-Client privilege. The Union's attorney cannot claim an Attorney-Client privilege at meetings in which Ms. Pilar Barton was present because the

Union and the Plaintiffs were not retaining the Union lawyers for the same action.

[Hearing pgs. 107-110.]

(c) The ALJ erred in this regard, and should allow the Employer to re-examine Ms. Barton, Mr. Rivera, Mr. Ochoa, Mr. Hernandez, Mr. Rabinowitz, Mr. Leeds, Mr. Gonzalez, Mr. Jose Ochoa and Mr. Burns.

7. THE ALJ ERRED IN DIS-CREDITING AN EMPLOYEES TESTIMONY THAT HE EXPECTED TO RECEIVED BETWEEN \$10,000 AND \$12,000 FROM THE LAWSUIT.
8. THE ALJ ERRED BY FAILING TO FIND THAT THE UNION ATTORNEYS VIOLATED NUMEROUS PROVISIONS OF THE CALIFORNIA CODE OF PROFESSIONAL CONDUCT, INCLUDING, BUT NOT LIMITED TO, THOSE REGARDING CHAMPERTY, BARRATRY, MAINTENANCE, CONFIDENTIALITY, AND CONFLICTS OF INTEREST.

The ALJ erred by not finding the Union Attorney's conduct to be in violation of the following portions of the California Code of Professional Conduct:

(a) Rule 1-320: Financial Arrangements with Non-Lawyers

Cal. R. Prof. Conduct 1-320 states that "[n]either a member nor a law firm shall directly or indirectly share legal fees with a person who is not a lawyer." Cal. R. Prof. Conduct 1-320(A) (emphasis supplied). Additionally, "[a] member shall not form a partnership with a person who is not a lawyer if any of the activities of that partnership consist of the practice of law." Cal. R. Prof. Conduct 1-310.

The Attorney-Client agreement is a financial arrangement between the Union attorney and the Union, which is not permitted under the rules. [Exhibit 1.] *See* Cal. State Bar Formal Opinion No. 1997-148. Also, the financial arrangement set forth under the Attorney-Client Agreement is one in which the Union will indirectly receive a portion of whatever recovery is had by the plaintiffs. If the plaintiffs recover any monetary amount, the fees they pay to the Union attorney may be 33⅓% of this very recovery. [Exhibit 1.] Out of this amount, the plaintiffs are also obligated to reimburse the Union for its advancement of this fee. [*Id.* at 6.]

Such an arrangement for the payment of fees – even if indirect – is improper, as the recovery still flows from the plaintiffs to the Union attorney and the Union. Courts disapprove of such "subterfuges to attempt to get away from the inhibition" codified in Rule 1-320.

(b) Rule 1-600: Legal Service Programs

Cal. R. Prof. Conduct 1-600 prohibits an attorney from participating: "in a nongovernmental program, activity, or organization furnishing, recommending, or paying for legal services, which allows any third person or organization to interfere with the member's independence of professional judgment, or with the client-lawyer relationship, or allows unlicensed persons to practice law, or allows any third person or organization to receive directly or indirectly any part of the

consideration paid to the member except as permitted by these rules, or otherwise violates the State Bar Act or these rules." Cal. R. Prof. Conduct 1-600(A).

Here, the Union attorneys could be implicated in a violation of this rule as well, given that there is strong evidence of a similar sort of collective scheme. The Union attorneys have been present at the Union's organizing meetings with Stericycle employees. [Hearing, pgs. 107-110]. The Union recommended the Union attorneys' services to the plaintiffs in the federal litigation and passed around the Agreement for Stericycle employees to review, so that the attorneys could recruit plaintiffs to the lawsuit. [Hearing pg. 101.]

What implicates the Union attorneys the most is the fact that it has shown their "independence of professional judgment" and "client-lawyer relationship" with the plaintiffs in the federal litigation have been hindered. The Union's December 22, 2008 offer to Stericycle management to settle the federal litigation is indicative of such an interference, given that the Union would have no authority to settle a case on behalf of individuals it does not represent. [See Hearing pg. 87.] The Union was adamant that it had the means to make such a settlement happen, indicating that the Union was the decisionmaker in the federal case, and not the Union attorneys or the plaintiffs. [Hearing pgs. 23-27.] It is thus apparent that the Union attorneys have compromised their relationship with the plaintiffs of the federal suit.

Also, as set forth in the Agreement, the Union attorneys have a financial arrangement with the Union whereby the Union, as a third party to the federal litigation, would indirectly receive a portion of whatever the plaintiffs would recover should they be successful in their federal case. Such an arrangement directly violates the prohibition codified in Rule 1-600.

(c) Rules 3-300 and 3-310: Conflicts of Interest in General

California has set rules over potential conflicts of interest and actual conflicts of interest. Depending on the severity of the conflict, either written disclosure or informed written consent is required. *See* Cal. R. Prof. Conduct 3-300 and 3-310.

Generally, an attorney cannot obtain interests adverse to a client. "A member shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to the client." Cal. R. Prof. Conduct 3-300.

The exception to this rule is if written disclosure is given to the client. *Id.* In other words, in the event of any of the above-referenced relationships, then the attorney must provide a written disclosure to the client before accepting representation or continuing representation of that client. *Id.* "Disclosure" means "informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former

client." Cal. R. Prof. Conduct 3-310(A)(1). The Attorney-Client agreement between the Union attorneys and the worker-Plaintiffs contain no such disclosure. [Exhibit 1.]

(d) Rule 3-310(F): Payment of Fees by a Non-Client

Rule 3-310 governs the payment of a client's fees by a non-client. Generally, "[a] member shall not accept compensation for representing a client from one other than the client." Cal. R. Prof. Conduct 3-310(F). California does not consider all situations where third party pays the fees of a client as unlawful, provided that the correct steps are taken to disclose this conflict of interest. The attorney must meet the following criteria:

(1) [t]here is no interference with the member's independence of professional judgment or with the client-lawyer relationship; and

(2) [i]nformation relating to representation of the client is protected as required by Business and Professions Code section 6068, subdivision (e); and

(3) [t]he member obtains the client's informed written consent. Cal. R. Prof. Conduct 3-310(F).

Here, evidence has already come to light that the Union attorneys' loyalty to the plaintiffs has been compromised. The Union attorneys have already breached their duty of confidentiality to the client which is mandated under California Business and Professions Code §6068(e)(1). Therefore, no informed written

consent can remedy the situation at hand. Had the Union attorney exercised loyalty and upheld its duty to the plaintiffs in the federal litigation, the Union would have never made its December 22, 2008 offer.

(e) Rule 4-200: Unconscionable and/or Illegal Fees

Cal. R. Prof. Conduct 4-200 dictates that a member of the bar "shall not enter into an agreement for, charge, or collect an illegal...fee." Cal. R. Prof. Conduct 4-200(A). Improper financial arrangements constitute the collection of an illegal fee. Thus, a viable argument can be made that since the Union attorney violated Cal. R. Prof. Conduct 1-320 and 1-600, then this, in turn, implicates the Union attorney in a violation of Rule 4-200.

Respectfully submitted this 22nd day of May, 2009.

SHEA STOKES ROBERTS & WAGNER

A handwritten signature in black ink, appearing to read 'Peter G. Fischer', written over a horizontal line.

Peter G. Fischer

3593 Hemphill Street
Atlanta, Georgia 30337
404/766-0076 – Phone
404/766-8823 - Facsimile

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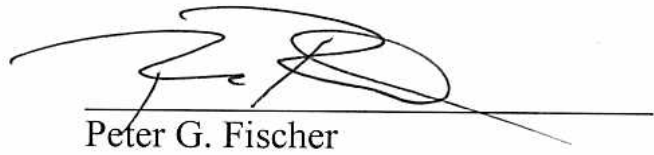
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Employers' Exceptions to The Administrative Law Judge's Report On Objections, was filed with the NLRB in Washington, D.C. via electronic filing through the NLRB website and an identical copy was sent to the Regional Direct, NLRB Region 32 via overnight delivery. An identical copy of this filing was also sent to the following by overnight delivery:

Jason Rabinowitz
Beeson, Taylor & Bodine
1404 Franklin St., 5th Floor
Oakland, California 94612

(510) 625-9700 Telephone
(510) 625-8275 Facsimile

This 22nd day of May, 2009.



Peter G. Fischer